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No. 83-446

In the Supreme Court of the United States

OCTOBER TERM, 1983

AL BRYANT, INC., ET AL., PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the NLRB correctly found that the unions' unfair labor practice charges were filed within the six-month limitations period imposed by Section 10(b) of the National Labor Relations Act.

2. Whether the NLRB properly exercised its discretion in refusing to defer to an arbitration decision that did not consider or decide the unfair labor practice issue presented to the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 711 F.2d 543. The decision and order of the National Labor Relations Board (Pet. App. A27-A114), including the attached decision of the administrative law judge, is reported at 260 N.L.R.B. 128.

JURISDICTION

The judgment of the court of appeals (Pet. App. A115-A116) was entered on July 25, 1983. The petition for a writ of certiorari was filed on September 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Al Bryant, Inc. (ABI), Harrisburg Drywall and Construction Corp. (Harrisburg Drywall), and Al Bryant Associates, Inc. (Associates) are contractors engaged in

the construction of ceilings, floors and drywall. The National Labor Relations Board found that ABI and Harrisburg Drywall constitute a single employer under the National Labor Relations Act, that Associates is the alter ego and a disguised continuance of ABI and Harrisburg Drywall, and that the companies' employees together constitute an appropriate bargaining unit (Pet. App. A29, A106-A107). The Board found that the companies violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize the charging unions as the exclusive bargaining representatives of Harrisburg Drywall and Associates employees and by refusing to apply the terms of agreements between the unions and ABI to the other two companies (Pet. App. A106-A108). The court of appeals affirmed (*id.* at A1-A26). Petitioners do not contest these findings, but rather challenge only the timeliness of the unfair labor practice charges involved and the Board's refusal to defer to an arbitration award in making its "single employer" finding.

1. ABI was formed by Albert Bryant in 1967. ABI is a member of the Central Pennsylvania Subcontractors Association (CPSA), which conducts labor negotiations on behalf of its members and which has negotiated agreements with both charging unions, the United Brotherhood of Carpenters District Council of Western Pennsylvania (Western) and Keystone District Council (Keystone). ABI has been bound by these agreements with the unions since 1974 (Pet. App. A49-A51).[1] Keystone and Western operate in different geographic areas.

In 1971, Bryant acquired ownership of Harrisburg Drywall. Harrisburg Drywall at no time signed any agreement with either union. Harrisburg Drywall engaged in the same

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[1]ABI signed a separate agreement with the International Carpenters Union in 1972 (Pet. App. A46).

construction activity as ABI but functioned as the nonunion component of a "double breasted" operation with ABI (Pet. App. A49).

Beginning in 1977, Keystone began to receive complaints from carpenters employed by Harrisburg Drywall in Keystone's jurisdiction that they were being paid less than union scale. On March 19, 1979, Keystone sent ABI a letter asserting that Harrisburg Drywall was related to ABI and that Harrisburg Drywall was covered by the collective bargaining agreement between CPSA and Keystone. Harrisburg Drywall continued to operate on a nonunion basis. Thereafter, Keystone initiated grievance and arbitration proceedings against ABI seeking to bind Harrisburg Drywall to the terms of the contract (Pet. App. A12-A13, A51).

Keystone contended in arbitration that Harrisburg Drywall, as a subsidiary of ABI, was bound by the CPSA agreement as a matter of contract and also as a matter of federal labor law because the two companies constituted a single employer under the Act. The arbitrator expressly declined to resolve the statutory issue and ruled that Harrisburg Drywall was not a subsidiary under the contract (Pet. App. A88-A90; see C.A. App. 777-780).[2] He therefore

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[2]The arbitrator stated (C.A. App. 777, 779-780; see Pet. App. A88):

> The Union in effect argues that Al Bryant, Inc. * * * established a subsidiary, Harrisburg Drywall and Construction Corporation; and that it has violated these Agreements in not requiring the subsidiary to comply with their terms * * *. Furthermore, the Union contends that, under rulings of the National Labor Relations Board, these two companies should be regarded as a "single employer" for purposes of the National Labor Relations Act * * * and that under the NLRB's *Collyer* deferral policy "the Arbitrator should rule on the statutory issue as well as the contractual one."
>
> * * * * *
>
> [T]he basic question before the Arbitrator is whether Harrisburg Drywall is a "subsidiary" or "subsidiary building construction

denied Keystone's grievance on October 29, 1979. On August 10, 1979, while the arbitration was pending, Keystone filed unfair labor practice charges against ABI and Harrisburg Drywall for "hiring non-Union employees in contravention of its obligation under the collective bargaining agreement" and for "having a non-Union subsidiary and refusing to recognize the Union as a representative of the employees employed by Harrisburg Drywall" (Pet. App. A6, A52).[3]

As found by the administrative law judge (ALJ), Western learned in January 1979 that Harrisburg Drywall had been awarded a contract in its jurisdiction for work on the Polk Center. A Western business representative telephoned Mr. Al Bryant and was informed that Harrisburg Drywall intended to perform the contract on a nonunion basis, notwithstanding Western's assertion that the job was covered by the CPSA. In May 1979 Bryant spoke with another Western official, who again asserted that the job should be performed under the union contract. Bryant responded, "I'll get back to you," but did not do so. Harrisburg Drywall began work on the Polk Center in June 1979 and performed the job on a nonunion basis. Pet. App. A55-A56. Western filed an unfair labor practice charge on October 3, 1979, alleging that ABI "d/b/a Harrisburg Drywall" had "[s]ince on or about June 1, 1979, and at all

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company" of Al Bryant, Inc. under * * * the Agreement. * * * In the Arbitrator's view, his role is limited to interpreting these terms of the Agreement, and it does not extend to enforcing the provisions of the Labor Management Relations Act.

[3]Petitioner Associates was not formed until 1979. Keystone filed an amended unfair labor practice charge on October 6, 1980, charging Associates and the other two companies with a refusal to bargain in good faith with Keystone (Pet. App. A6, A52-A53). Petitioners challenge the timeliness only of Keystone's initial charge against ABI and Harrisburg Drywall.

times thereafter, * * * failed and refused to bargain collectively and in good faith with [Western]" (Pet. App. A6).

2. a. The Board, substantially adopting the findings and conclusions of the ALJ, found that the charges of both unions were timely filed. With respect to the Western charge filed on October 3, 1979, the Board found that the six-month limitation period of Section 10(b) of the Act, 29 U.S.C. 160(b),[4] commenced when Harrisburg Drywall began work on the Polk Center in June 1979, not in January 1977 when Western learned of Bryant's *intention* not to abide by the CPSA contract (Pet. App. A57). With respect to the Keystone charge of August 10, 1979, the Board found that ABI's failure properly to respond to the union's March 19, 1979 letter constituted a refusal to bargain that commenced the Section 10(b) period, although Keystone had been aware of Harrisburg Drywall's nonunion operations in its jurisdiction for more than six months before the charge was filed (Pet. App. A57-A61).

b. The Board also determined that petitioners constituted a single employer under the Act. In this connection, the Board refused to defer to the arbitrator's finding that Harrisburg Drywall was not an ABI "subsidiary" under the contract. The Board explained (Pet. App. A29-A30 n.2):

> We agree with the Administrative Law Judge that deferral to the arbitrator's award which was introduced into evidence is inappropriate in the instant case. In so doing, we find that the arbitrator expressly declined to resolve the statutory issue before us. Thus, in his decision the arbitrator expressly stated that the "basic question before the Arbitrator is whether

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[4]Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

> Harrisburg Drywall is a 'subsidiary' or 'subsidiary building construction company' of Al Bryant Inc. . . ." within the intendment of the contract. He specifically stated that his role was limited to interpreting the terms of the agreement and did "not extend to enforcing the provisions of the Labor Management Relations Act." The arbitrator then found that the NLRB and court cases cited to him by the Union were not enlightening as to the definition of a "subsidiary" and thus he relied on dictionary definitions. Based on the tenor of the arbitrator's entire decision, it is clear he did not consider the statutory issue. It is also clear that the arbitrator did not have the same evidence before him as in the instant case.

3. The court of appeals affirmed (Pet. App. A1-A26). The court found that the Board's conclusion that the charges were timely filed was "consistent with well-established legal principles" and with the policies underlying Section 10(b) (Pet. App. A7-A12).

With respect to the Board's refusal to defer, the court of appeals explained (Pet. App. A15):

> The requirement that the statutory issues have been presented to and decided by the arbitrator is of particular significance to insure that the Board does not abdicate its responsibility to protect statutory rights. * * * The Board recently reaffirmed it would not defer "unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146, 146-47 (1980). Given the arbitrator's explicit statement that he was not resolving the statutory issue, and the fact that he did not have all the relevant evidence before him, we cannot hold that the Board abused its discretion in refusing to defer to the arbitral award.

ARGUMENT

1. Petitioners contend (Pet. 9-20) that the unfair labor practice charges were not timely filed. They contend that the unfair labor practice against Western occurred when Bryant stated his intention in January 1979 not to adhere to the CPSA contract on the Polk Center job. They further contend that any unfair labor practice affecting Keystone occurred when Harrisburg Drywall began operating in its area in 1977, and that the refusal to respond to the union's March 19, 1979 letter was not an independent violation. These contentions were correctly rejected by the Board and the court below and raise no issue warranting review by this Court.

a. The Board's position that Keystone's March 19, 1979 letter triggered the limitations period is consistent with this Court's decision in *Local Lodge No. 1424, International Association of Machinists* v. *NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960), and every court of appeals decision that has considered the effect of Section 10(b). In *Bryan Manufacturing Co.*, the Court described the policy underlying Section 10(b) as intended "to bar litigation over past events' after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused * * *.' " 362 U.S. at 419 (quoting H.R. Rep. 245, 80th Cong., 1st Sess. 40 (1947)). The Court held that Section 10(b) bars a charge grounded on events predating the limitations period "where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice" (362 U.S. at 416-417). Section 10(b) does not bar a charge where conduct within the period constitutes an unfair labor practice in and of itself, even though related events predate the limitations period (*id.* at 416).

In *Bryan Manufacturing Co.*, the only act within the Section 10(b) period was the enforcement of a union security agreement valid on its face. This activity, by itself, was benign and could be impeached only by resorting to an event outside the limitations period — *i.e.*, by showing that the union lacked majority status when it entered into the agreement. The Court therefore held that the complaint was barred. Here, by contrast, petitioners' refusal to bargain after March 19, 1979 was unlawful in itself without reference to the illegality of prior events.

Because an employer's general duty to bargain is a continuing obligation, each refusal constitutes a separate and independent unfair labor practice. *J. Ray McDermott & Co.* v. *NLRB*, 571 F.2d 850, 858 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *NLRB* v. *Basic Wire Products, Inc.*, 516 F.2d 261, 267-268 (6th Cir. 1975). Based on the interrelationship of the companies at the time of the March 19 demand and their obligation to apply the contract at that time, the March 19 refusal may be found to violate the Act without regard to any prior refusals to bargain. In such circumstances, the courts have uniformly held that Section 10(b) is no bar to an unfair labor practice finding.[5]

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[5]See, *e.g.*, *Chesapeake & Potomac Telephone Co.* v. *NLRB*, 687 F.2d 633, 637-638 (2d Cir. 1982) (employer refusals to produce information related to grievance proceeding); *J. Ray McDermott & Co.* v. *NLRB*, *supra* (repeated refusals to bargain); *NLRB* v. *Basic Wire Products, Inc.*, *supra* (repeated refusals to bargain); *General Motors Acceptance Corp.* v. *NLRB*, 476 F.2d 850, 853-854 (1st Cir. 1973) (employer campaign to discredit union involving conduct over a two-year period); *NLRB* v. *Erie Marine, Inc.*, 465 F.2d 104, 107-108 (3d Cir. 1972) (employer domination of joint employee-employer committee over a period of three years); *Cone Mills Corp.* v. *NLRB*, 413 F.2d 445, 448-449 (4th Cir. 1969) (employer refusals to provide information concerning pension plan); see also *NLRB* v. *Los Angeles Yuma Freight Lines*, 446 F.2d 210, 215 (9th Cir. 1971) (employer refusal to bargain, after union makes renewed request within the limitations period, would constitute independent violation).

The cases cited by petitioner (Pet. 19) (*NLRB* v. *Serv-All Co.*, 491 F.2d 1273 (10th Cir. 1974); *NLRB* v. *McCready & Sons, Inc.*, 482 F.2d 872 (6th Cir. 1973); *NLRB* v. *Field & Sons, Inc.*, 462 F.2d 748 (1st Cir. 1972)) are not to the contrary. Those cases involve an employer's refusal to execute within the Section 10(b) period an individual union contract following negotiation of a multiemployer agreement that predated the period. The refusal to sign, standing alone, is not an unfair labor practice; it can be found to be one only by reference to events surrounding the multiemployer negotiations (*i.e.*, whether the employer was a member of the multiemployer unit and was bound by the negotiations). Indeed, the court in *Field & Sons* expressly distinguished that case ("a failure to perform a particular act") from the situation presented here, involving an employer's repeated breach of the general duty to bargain, where the violation can be determined based on the status of the employer within the limitations period. See 462 F.2d at 751; see also Pet. App. A12.[6]

b. The Board's conclusion that the Western charge was timely is consistent with the well-established principle that a statement of intent to commit an unfair labor practice does not start the Section 10(b) period running. The limitations period begins only when the unfair labor practice occurs. *NLRB* v. *Plumbers & Pipe Fitters Local Union 214*, 298 F.2d 427, 428 (7th Cir. 1962); see also *Local 1104, Communications Workers* v. *NLRB*, 520 F.2d 411, 416 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976); *Mack Trucks, Inc.*, 230 N.L.R.B. 993, 1000 (1977), enforced, 573 F.2d

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[6]There is no merit to petitioner's contention (Pet. 18) that the decision below effectively eliminates Section 10(b) and opens the door to large backpay awards stretching far back in time. To the contrary, the remedy is limited to six months before filing of the charge. See Pet. App. A12 n.4.

1302 (3d Cir.), cert. denied, 439 U.S. 825 (1978). The violation here occurred when Harrisburg Drywall violated the CPSA contract by beginning the Polk Center job in June 1979, not when Mr. Bryant merely stated his intention in January to perform the job on a nonunion basis.

Moreover, contrary to petitioners' contention (Pet. 14-15), even if Mr. Bryant's statement to Western in January were itself a violation of the Act, Section 10(b) would not bar a charge based on the subsequent refusal to apply the contract at Polk Center in June. Under the principles discussed above, the refusal to apply the contract in June 1979 was an independent and complete violation notwithstanding conduct that might have occurred earlier.[7]

2. Petitioners contend that the Board erred in refusing to defer to the arbitrator's finding that Harrisburg Drywall was not a "subsidiary" under the ABI contract. They contend that this finding was a "complete defense" to Keystone's unfair labor practice charge (Pet. 22). This contention does not warrant review by this Court.

Section 10(a) of the Act, 29 U.S.C. 160(a), vests the Board with exclusive authority to adjudicate and remedy unfair labor practices. See *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436-437 (1967). Although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so when an unfair labor practice has been committed. See *NLRB* v. *Strong*, 393 U.S. 357, 360-362 (1969). When the Board does assert jurisdiction, its unfair labor practice decision takes precedence over arbitral awards that enforce private contract rights. See *Carey*

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[7]Petitioners' reference (Pet. 11-15) to Section 8(f) of the Act, 29 U.S.C. 158(f), governing pre-hire agreements is wholly irrelevant. There is no question here of the majority status of the unions, and the ALJ explicitly found that Section 8(f) was not applicable (Pet. App. A74 n.33).

v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964). In exercising its discretion, the Board has determined to defer to an arbitration decision only if (1) the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act; (2) the arbitration procedures are fair and regular; (3) the parties have previously agreed to be bound by the arbitrator's decision; and (4) the arbitrator has considered and decided the unfair labor practice issue presented to the Board. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Raytheon Co.*, 140 N.L.R.B. 883, 884-885 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964).

As noted above (page 3, *supra*), the Keystone grievance argued both that Harrisburg Drywall was a subsidiary of ABI as a matter of contract and that the two companies constituted a "single employer" under the Act. The arbitrator expressly declined to decide the statutory question whether the connection between the companies supported a finding of an unfair labor practice, explaining that the question before him was whether Harrisburg Drywall was a subsidiary under the contract. He specifically stated that his role was "limited to interpreting [the contract terms], and it does not extend to enforcing the provisions of the Labor Management Relations Act" (Pet. App. A88; C.A. App. 779-780).

The arbitrator relied on two dictionary definitions of "subsidiary" in deciding the contractual question.[8] That inquiry differs substantially from the statutory single

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[8]The arbitrator stated (Pet. App. A89; C.A. App. 780):

> Here, the parties have not defined what should be considered to be a "subsidiary." Webster's New World Dictionary (College Edition) defines a "subsidiary" in part as:
>
> > a company controlled by another company which owns most of its shares . . .

employer question, in which the Board examines the evidence as to interrelation of operations, common management, centralized control of labor relations, and common ownership. See *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). Moreover, as the Board noted, the arbitrator did not have before him all the evidence relevant to the statutory question (Pet. App. A29-A30 n.2).[9]

The Board reasonably may decline to defer where, as here, the unfair labor practice and contract claims pose substantially different issues and the arbitrator does not reach the statutory claim. *Hammermill Paper Co.* v. *NLRB*, 658 F.2d 155, 161 (3d Cir. 1981), cert. denied, No. 81-1438 (Apr. 18, 1983); *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146, 146-147 (1980). Also, the Board may reasonably decline to defer where, as here, the arbitrator has not considered "all the facts required to decide [the statutory issue]." *NLRB* v. *General Warehouse Corp.*, 643 F.2d 965, 969 (3d Cir. 1981) (footnote omitted). See also *United Parcel Service, Inc.* v. *NLRB*, 706 F.2d 972 (3d Cir. 1983), cert. denied, No. 83-71 (Nov. 7, 1983).

Black's Law Dictionary, Fourth Edition (revised) 1968 states:

> Subsidiary Corporation. One in which another corporation owns at least a majority of the shares and thus has control
>
> . . .

[9]For example, the arbitrator did not have the employment rosters of Harrisburg Drywall or any information that Mr. Bryant signed bids for Harrisburg Drywall (Pet. App. A30 n.2). This information was available to the Board (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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